

REPORT OF THE COMMONWEALTH COMPETITION COUNCIL

**A STUDY OF THE
COMMONWEALTH OF VIRGINIA
MINORITY CERTIFICATION PROGRAM**

**TO THE GOVERNOR, THE GENERAL ASSEMBLY,
AND THE SMALL BUSINESS COMMISSION**



**COMMONWEALTH OF VIRGINIA
JANUARY 14, 2002**



COMMONWEALTH of VIRGINIA

Commonwealth Competition Council

Mark R. Warner
Governor

January 21, 2002

TO THE GOVERNOR, THE GENERAL ASSEMBLY,
AND THE SMALL BUSINESS COMMISSION

ADDENDUM NO. 1

A STUDY OF THE COMMONWEALTH OF VIRGINIA MINORITY CERTIFICATION PROGRAM

Subsequent to the release of the Commonwealth Competition Council's report entitled, "A Study of the Commonwealth of Virginia Minority Certification Program," dated January 14, 2002, additional information has been received from the Department of Minority Business Enterprise. In its report to the Governor dated November 30, 2001, and received by the Commonwealth Competition Council on January 17, 2002, the Department submitted its analysis of the level of minority-owned businesses participation in the procurement of goods and services by the Commonwealth of Virginia. That information should be reflected in Table 1 under FY01. In lieu of "Not Available" the recently released data is shown in italics.

Table 1
Virginia Expenditures with Minority Owned Businesses

Source: Department of Minority Business Enterprise Annual Reports

FY	State Total Expenditure	Total Minority Expenditure	Minority Percentage of Total Expenditure	Minority Percentage based on DMBE Certified List
98	\$3,034,407,069	\$202,597,850	6.68 %	2.78%
99	\$4,218,673,719	\$302,022,887	7.16%	2.05%
00	\$4,059,858,108	\$276,148,517	6.08%	2.08%
01	Not Available <i>\$5,725,550,482</i>	<i>\$324,098,382</i>	<i>5.66%</i>	<i>1.44%</i>

Please note this change on Pages v and 12 in the January 14, 2002, report.

Should you have any questions, please do not hesitate to contact the Commonwealth Competition Council.

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Embracing the Spirit of Opportunity



COMMONWEALTH of VIRGINIA

Commonwealth Competition Council

Mark R. Warner
Governor

January 14, 2002

TO:

The Honorable Mark R. Warner, Governor of Virginia,
Members of the Virginia General Assembly,
and
the Small Business Commission

The Commonwealth Competition Council, through its strategic planning process, directed the formation of a Competition Council Task Force to study the Commonwealth of Virginia's minority certification program.

The Task Force was charged with reviewing the existing minority certification program with the goal of increasing the opportunity for minority businesses to contract with State government. The goal was to be accomplished by building on the existing minority certification program and consolidation of duplicate programs. Outsourcing was to be a consideration as appropriate.

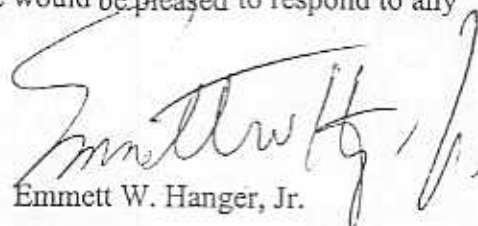
The objective of the study was to improve minority business participation in state government purchasing by improving the certification activities and functions currently undertaken by the Department of Minority Business Enterprise. The Department has initiated many positive programs in the last ten months to assist minority businesses in the Commonwealth. Improved certification activities will help minority businesses and facilitate state agencies and institutions to comply with existing provisions of the *Code of Virginia*. This action will significantly increase State agency utilization of minority and women-owned businesses in the state procurement process. An added benefit will be an increase in value to the Commonwealth in the form of additional revenues from these small businesses.

We are pleased to report that existing law provides the fundamentals for a strong supplier diversity program. However, extensive duplication of effort exists which hampers implementation of the minority certification program. Furthermore, technology and oversight have not been used to the fullest extent possible to implement the program and to provide a valid measure of the State's progress in achieving its stated objectives.

Embracing the Spirit of Opportunity

On behalf of the Task Force and members of the Commonwealth Competition Council, we would like to express our appreciation for the cooperation and assistance provided during this review by officials from numerous State agencies and institutions, major corporations, minority and women-owned businesses, the City of Richmond Office of Minority Business Enterprise and the host of not-for-profit organizations dedicated to improving the opportunities for minority and women-owned firms in Virginia.

We trust that the recommendations made pursuant to this study will serve the Commonwealth of Virginia and all its citizens. We would be pleased to respond to any question or comment you may have on this study.



Emmett W. Hanger, Jr.

Competition Council Chairman

Minority Certification Program Task Force Members



Bernice Travers

Chairwoman



Earl McClenney, Jr.

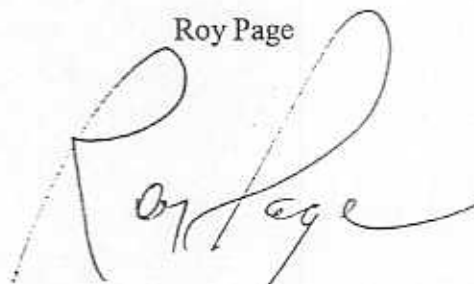
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Report of the Commonwealth Competition Council

A Study of the Commonwealth of Virginia

Minority Certification Program

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Commonwealth Competition Council A Study of the Commonwealth of Virginia Minority Certification Program

Executive Summary

In April 2001, the Commonwealth Competition Council approved the study of the minority certification program for the State as operated by the Department of Minority Business Enterprise.¹ The Virginia program has a lengthy history.

The objective of the study was to improve minority business participation in state government purchasing by improving the certification activities and functions currently undertaken by the Department of Minority Business Enterprise. Improved certification will bring the operation of the agency in compliance with existing provisions of the *Code of Virginia*. This action will significantly increase State agency utilization of minority and women-owned businesses in the state procurement process. An added benefit will be an increase in value to the Commonwealth in the form of additional revenues from these small businesses.

The Virginia Public Procurement Act prohibits discrimination and promotes the inclusion of small, women-owned and minority businesses whenever solicitations are made in the State procurement process. However, the State does not have set aside quotas or specific numeric goals for minority and women-owned business participation.

The Department of General Services' Agency Procurement and Surplus Property Manual encourages agencies to set voluntary goals and solicit bids and proposals from minority and women-owned businesses. However, agency oversight in this area is minimal, if at all, in many cases.

The Commonwealth Competition Council is charged to:

"...Advocate, develop and accelerate implementation of a competitive program for state entities to ensure competition for the provision or production of government services, or both, from both public and private sector entities." (*Code of Virginia* § 2.2-2622[5])

Facilitating the expansion of existing small businesses and creating new private enterprise resources, such as minority and women-owned businesses, through effective certification processes assure proper compliance with the law. In that respect, implementation of a quality State certification program is critical to facilitate supplier diversity in the Commonwealth. Additionally, value is added to the Commonwealth's procurement process in assuring the best available services and products.

The following table details the statewide expenditures with minority-owned business in the last four fiscal years:

¹ Hereinafter, when the word Minority or the phrase Minority Business Enterprise is used in the report, it is intended to encompass and include any and all ethnic, social, gender, cultural, and racial groups as defined by applicable Virginia and Federal law.

Table 1
Virginia Expenditures with Minority Owned Businesses

Source: Department of Minority Business Enterprise Annual Reports

FY	State Total Expenditure	Total Minority Expenditure	Minority Percentage of Total Expenditure	Minority Percentage based on DMBE Certified List
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99	\$4,218,673,719	\$302,022,887	7.16%	2.05%
00	\$4,059,858,108	\$276,148,517	6.08%	2.08%
01	Not Available			

A timely, accurate, and Internet-based certification program is needed to determine credentials for minority and women-owned business. This web based certification program will simplify business submission requirements. Furthermore, a web-based program will provide access to the certified firms on a 24x7 basis. It can be used by State agencies and institutions, local government, and business interests throughout the State.

Minority and women-owned businesses that want to provide the State with goods and services are subject to the Virginia Public Procurement Act as are all other businesses. The State does not give minority-owned firms any preference over non-minority firms in competition for the State's business. The State has, however, established policy to ensure that minority-owned businesses have opportunities to participate in the State procurement program. Minority-owned businesses rely on the Department of Minority Business Enterprise certification and the State's agencies and institutions for implementation of the State procurement policy when conducting solicitations for needed goods and services.

The State provides a variety of training and funding assistance services to minority-owned business. However, these services are fragmented and dispersed in several agencies. The lack of a readily available web-based certification program by the Department of Minority Business Enterprise has lead to extensive duplication of effort by numerous state agencies and institutions in their effort to comply with existing law. Furthermore, it has caused the unintended consequence of creating confusion and disinformation in the minority business community.

**Business Supplier Diversity Program Best Practices
Compared to the Commonwealth's requirements and practices
in Minority Procurement**

The following table lists the key elements of business supplier diversity program best practices. The left column lists the business best practices reported by Philip Morris, Dominion Resources, and Bon Secours Hospital. The right column provides a *Code of Virginia* reference or a discussion of the Commonwealth's current practices.

Table 2
Supplier Diversity Program Best Practices
Compared with Commonwealth of Virginia Practices

Corporate	Commonwealth
CEO Policy Statement	General statements/ <i>Code of Virginia</i> Requirements
Certification Site 24x7 listing firms	Not at Present. Limited Data base Department of Minority Business Enterprise (DMBE)
Supplier Diversity Plan	<i>Code of Virginia</i> §2.2-4310 Agencies Required to Prepare Plan: Not fully implemented
Monthly Reporting Tier 1 & 2	None: Annual Report <i>Code of Virginia</i> § 2.2-1405
High Level Organizational Input/Monitor Management Understanding/Support	<i>Code of Virginia</i> §2.2-1404 Interdepartmental Board Not implemented
Supplier Diversity Champions	<i>Code of Virginia</i> § 2.2-1404 C. Designate individual with primary and continuing responsibility in each department. Not Implemented
Continuous Improvement/No set asides	Vague language Agency Procurement and Surplus Property Manual (APSPM) No set asides
Incorporate MBE in Purchasers Performance Appraisal	No general policy to include MBE evaluation in annual performance appraisals
2 nd Tier Program Support	Some Language in APSPM
Good budget to support supplier diversity program	Appropriation Act splits DMBE funding between General Fund and Virginia Department of Transportation (VDOT)
Strategic Alliances	PACE program jointly administered

The General Assembly has set the standard in existing law. When both columns are compared, it is apparent that the Commonwealth generally has the framework in law and regulation to conduct a successful supplier diversity program. Areas where improvement is needed are in bold.

The Department of Minority Business Enterprise must demonstrate leadership and significant improvement in the core mission function of certification in the next six months. The certification program is a regulatory function of government. The department's failure to take advantage of existing *Code* requirements may be cause for considering other options for the certification program to include outsourcing the function or reassigning it to another department.

Other immediate actions include the implementation of the Interdepartmental Board and requesting agency representatives to act as supplier diversity champions as permitted in current law. (*Code of Virginia* § 2.2-1404 and § 2.2-1404 C). This will add over 100 individuals in support of the State's diversity program. Extensive training resources exist in the Commonwealth to assist developing businesses. Leveraging the existing multiple sources of training and acting as a referral center further expands the ability of the Department of Minority Business Enterprise to serve the minority community needs without added funding.

Existing *Code* requirements need to be implemented in a manner commensurate with importance the private sector businesses attach to their supplier diversity programs. Action is required by every agency and institution in the Commonwealth. A monthly report of tier 1 and 2 procurement expenditures is needed by management to measure the effectiveness of their supplier diversity programs.² The mechanics are in place to capture the dollars expended and to report on a monthly basis without "paper reporting."

² A tier 1 business is a prime contractor. A tier 2 business is a subcontractor for the tier 1 contractor.

The State cannot do business directly with every minority firm; therefore, an expanded 2nd tier program to encourage the use of minority subcontractors and to report on their use is needed. This revised program would update the 1991 Secretary of Administration guidance in the Agency Procurement and Surplus Property Manual and add the requirement to the Commonwealth of Virginia Construction and Professional Services Manual for Agencies (Capital Outlay Manual).

The minority business community must also share the challenge to improve supplier diversity and participation in the State's procurement process by active involvement in the certification process. This is because there are no set aside contracts or preferences based on race, gender or ethnicity. Everyone has the opportunity to compete.

Supplier Diversity:

The burgeoning global marketplace places new requirements for cross-cultural literacy and openness to change and flexibility. Recent census data clearly indicates a seismic demographic shift in Virginia's marketplace which will extend over the next few decades. Virginia has ridden a wave of unprecedented growth and our citizens expect this to continue. The Commonwealth is moving forward beyond the divisions of the past. This promises equality and a greater opportunity for all Virginians. A new department name, such as the Department of Supplier Diversity, reflects this growth trend and a focus on the future.

Specific recommendations to accomplish the actions noted above are included in the body of the report.

Commonwealth Competition Council

A Study of the Commonwealth of Virginia Minority Certification Program

Introduction

The Commonwealth Competition Council undertook the review of the Department Minority Business Enterprise minority certification program as an initiative to improve minority business contract opportunities in state government. Improving minority business participation in State procurement advances the goals of the Commonwealth Competition Council by making government more competitive. This effort reflects the guidance contained in the *Code of Virginia* and the growing diversity in the makeup of our Commonwealth.

The Commonwealth Competition Council Task Force, under this mandate, comprehensively researched State law and policy to assess the amount of agency and institution purchases of good and services from minority-owned companies. The study evaluated relative components of the procurement process and identified best practices to promote minority participation in State contracts.

Presentations were received from the Department of Minority Business Enterprise and other State agencies and institutions, to include:

- Department of Business Assistance
- Virginia Department of Transportation
- Virginia Commonwealth University
- Division of Purchases and Supply, Department of General Services

The City of Richmond Office of Minority Business Enterprise and the United States Small Business Administration presented their views on the certification process and made suggestions for improvement. Representatives from the private sector included:

- The Virginia Regional Minority Development Suppliers Council
- Metropolitan Business League
- Philip Morris
- Dominion Resources
- Bon Secours Hospital
- Minority business owners interested in the certification study
- Individuals representing construction trades and contractors associations

The Task Force extends its appreciation to the Department of Minority Business Enterprise, other state agencies and institutions, and the City of Richmond Office of Minority Business Enterprise that assisted in the preparation of this report. A special thank you is extended to those minority firms who took time from their business to meet with the Task Force. Lastly, we thank Philip Morris, Dominion Resources, and Bon Secours Hospital for presenting their successful diversity supplier programs and explaining their best practices in supplier diversity. Their successes added significantly to the study outcomes.

Background:

In June 1972 an Executive Memorandum was signed by Governor Linwood Holton, designating Virginia State College (now Virginia State University) as the location of the State Office of Minority Business Enterprise. The functions of the initial office are very similar to those we find in the *Code of Virginia* today. The Governor's action was in response to the federal program announced by President Richard M. Nixon in his Executive Order 11625 dated October 13, 1971.

In May 1974 Governor Mills E. Godwin, Jr., issued Executive Order Number 6, which directed Virginia State College to establish the State Office of Minority Business Enterprise, and designated specific functions to be carried out by the office.

In February 1975 Governor Godwin signed Senate Bill 471 to permanently establish the Virginia State Office of Minority Business Enterprise. Virginia was the first in the nation to establish a State Office of Minority Business Enterprise.

The goals, mission, and functions of the office set up in 1974 and 1975 are very similar to those functions assigned to the Department of Minority Business Enterprise today by the *Code of Virginia*. The Department was moved to Richmond under the Secretary of Administration and ultimately to the Secretary of Commerce and Trade where it resides today.

A number of state agencies perform essentially the same or similar certification functions with similar goals and outcomes as the certification program the *Code of Virginia* assigns to the Department of Minority Business Enterprise. Accordingly, extensive duplication exists in the State's minority certification program. Eliminating this duplication will enhance women and minority-owned business opportunities for State contracts. Furthermore, it will provide a one-stop resource for State agency procurement professionals who need certification information on available minority suppliers.

It is equally important that the Department of Minority Business Enterprise achieve consensus and work with State organizations to implement a viable minority certification program to meet their procurement needs consistent with established legislative mandates. A web-based certification program will also meet the need of Virginia's local governments and the private sector. This must include a web-based application form and a certification data base that is available on a 24x7 basis.

The Commonwealth of Virginia does not have set aside or preference programs with specified goals for minority firms competing for State business. State law prohibits discrimination and promotes the inclusion of small, women-owned and minority firms in the procurement process. Significant oversight and interagency coordination and cooperation are needed to find, certify, solicit, and use minority-owned business in compliance with existing statutes.

Current law establishes the framework for a viable supplier diversity program that parallels the best program in the private sector. State agency and institution compliance with existing guidance is needed to produce a world class program for all our citizens.

The Virginia Public Procurement Act governs the Commonwealth of Virginia's policies for public procurement of small, women-owned and minority-owned business activity³. The Act clearly promotes competition and the desire to acquire goods and services from the lowest responsible bidder.

³ VDOT public procurement is influenced by Federal Regulations where federal dollars are used.

State Minority Certification, Reporting and Census Trends Since 1974

A review of archived documents in the Library of Virginia noted a May 1974 annual report to the Governor which stated there were more than 8,100 minority owned or controlled businesses in Virginia showing gross receipts of less than 2.5 percent of the total business activity in the State. A total of **1,500** minority businesses were listed as certified with the Department of Minority Business Enterprise at Virginia State College (in 1974).

In 1997, based on the latest available data from the Census Bureau, in Virginia there were 33,500 African American-owned businesses; 13,700 Hispanic-owned firms; 22,400 Asian, Pacific Islander-owned firms; and 3,300 American-Indian-owned and Alaskan-Native-owned businesses.⁴

Women owned 132,200 (27.5 percent) of businesses in 1997 in Virginia and employed 172,227 people. Firms were formerly classified as women-owned if women's share of ownership was 50 percent or more, but the 1997 data classifies a firm as woman-owned if women's ownership share is 51 percent or more.⁵

Minority Supplier Access to State Purchasing:

There are a number of issues that affect whether or not minority businesses have access to and are receiving an appropriate share of the State's business with the private sector. Some of the considerations are the definition of minority businesses, the legality of preference programs, and the role of minority supplier/access programs within the State's overall procurement program.

Although definitions of race and minority business status can vary, this report uses the definition found in §2.2-1401 of the *Code of Virginia*. "Minority business enterprise" means a business enterprise that is owned and controlled by one or more socially and economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such persons include, but are not limited to Blacks, Hispanic Americans, Asian Americans, American Indians, Eskimos, and Aleuts.

The term "owned and controlled" means that minorities must own at least 51 percent of the business and that they must control the management and daily operations of the business. It should be noted that this report primarily addresses policies and programs related to minority-owned businesses, not disadvantaged businesses, which also includes small businesses owned by women. Furthermore, §2.2-4310 of the *Code of Virginia* specifies the establishment of programs to facilitate small business and businesses owned by women and minorities.

Recent Court Rulings and Virginia Policy:

Several recent U. S. Supreme Court decisions have called into question the minority procurement policies of local, state, and federal governments. These Court decisions have not explicitly struck down affirmative action programs such as set-asides or minority preferences. Rather, they have required that a difficult-to-meet "strict scrutiny" standard be applied to programs with racial preferences. Because no State programs in Virginia have racial preferences, the Court's decision will have limited impact on current State government policies. These cases will, however, set limits on actions the State may consider taking in the future. In contrast, local government programs in Virginia have been directly affected. One of the Court's decisions (*Croson*) overturned a City of Richmond set aside program.

⁴ Sources: U.S. Department of Commerce, Bureau of the Census.

⁵ Sources: U.S. Department of Commerce, Bureau of the Census; U.S. Department of Labor, Bureau of Labor Statistics.

City of Richmond v. J.A. Croson Company, 1989. In this decision, the U. S. Supreme Court ruled that the City of Richmond's 30 percent minority set aside program was illegal. The Court ruled that the set aside was arbitrary and based loosely on population. When considering availability of minority firms, an intuitive argument is sometimes made that the number of minority-owned firms should be in rough proportion to the minority population in general. However, *Croson* stated, "where special qualifications are necessary . . . the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake a particular task." Furthermore, the Court said that the "strict scrutiny" test must be applied to all local and state programs of racial classifications.

Strict scrutiny is the highest level of constitutional review. It requires that a government demonstrate a compelling interest in a race-based program, and further that the program itself be structured as "narrowly tailored" as possible to effectuate that purpose. Without a finding of very specific discrimination in public procurement, preference programs, such as Richmond's, were found to violate the equal protection clause of the 14th Amendment to the *U. S. Constitution*. The requirement that the program be "narrowly tailored" meant that the racial distinctions incorporated in the program must be absolutely necessary in order to ensure the program's success and that such distinctions did not extend any further than necessary so that third parties who had not participated in discrimination were not unduly burdened. The decision further required that a preference program be the sole available remedy to discrimination, even when the evidence has met the heaviest burden of proof of discrimination. As a result of this decision, the City of Richmond had to modify its minority procurement programs.

Adarand v. Peña, 1995. In 1995, the Supreme Court extended *Croson's* standards to federal programs. The Court stated, "All racial classifications imposed by whatever federal, state, or local governmental contractor, must be analyzed by a reviewing court under strict scrutiny."

The practical effect of *Adarand* will be to subject federal preference programs to the strict scrutiny standard. Set aside programs addressed by *Adarand* are not used by Virginia agencies, however. Unlike the Colorado program affected by *Adarand*, wherein prime contractors are given additional compensation for utilizing minority subcontractors, the Virginia Department of Transportation (VDOT) has a voluntary program to meet the requirements of U. S. Department of Transportation regulations.

However, *Adarand* has had some influence on Virginia policy. The first effect of *Adarand* on VDOT has been to contribute to the lowering of the department's voluntary numerical target from 12 percent to 10 percent. (VDOT currently encourages prime contractors to make good faith efforts to subcontract with disadvantaged businesses.)

Disadvantaged businesses include small businesses owned by women or minorities. *Adarand* also influenced VDOT to delete from contracts language relating to its goal of providing five percent of State-funded projects to disadvantaged businesses. The broader effect of such Court rulings as *Croson* or *Adarand* will be to limit the range of options available to the State, were it to seek to increase minority participation in State contracts through a system of preferences or set asides. The State's policy since the late 1960s and early 1970s, however, has been to prohibit discriminatory practices, not to establish programs involving preferences, set asides, or monetary incentives.

In November 2001 the Supreme Court abandoned its plan to rule on a major challenge to federal agencies' affirmative action programs in the case, *Adarand Constructors Inc. v. Mineta*.

Current Anti-Discriminatory Policies in Virginia

An era of statutory segregation in Virginia came to a close in 1970, when the General Assembly repealed §§ 56-390 through 56-404 of the *Code of Virginia* relating to the "Segregation of the Races, etc." In addition, Article I, §11 of the *Constitution of Virginia*, effective July 1, 1971, provides for due process of law, and further protects the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin.

Other anti-discriminatory legislation passed since 1970 includes the Virginia Fair Housing Law (1972), the creation in 1972 of the Office of Minority Business Enterprise now the Department of Minority Business Enterprise (DMBE), and the Virginia Fair Employment Contracting Act, also enacted in 1975, now the Virginia Public Procurement Act. Approved March 24, 1975, this Act (§2.2-4200 of the *Code of Virginia*) declared it "...to be the policy of the Commonwealth to eliminate all discrimination on account of race, color, religion, sex, or national origin from the employment practices of the Commonwealth, its agencies, and government contractors." It further states that "In the awarding of contracts, contracting agencies shall not engage in an unlawful discriminatory practice as defined in § 2.2-3901."

The *Code of Virginia*, in § 2.2-4201, requires that in every government contract over \$10,000, "...The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin, except where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor..." However, this Act also made it clear that preferences were not to be used. Economic inequality was addressed in 1975 by the *Federal Equal Credit Opportunity Act*, which made it unlawful for any creditor to discriminate on the basis of race, color, religion, national origin, sex, marital status, or age.

In 1982, the General Assembly enacted the Virginia Public Procurement Act, which enunciated the public policies of the Commonwealth pertaining to governmental procurement from nongovernmental sources. The Act includes, but is not limited to:

- (1) the prohibition of discrimination by a public body;
- (2) the establishment of programs to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions;
- (3) the prohibition of discrimination by a contractor; and
- (4) the creation of the policy concerning the acceptance of the lowest responsible bid.

Section 11-44, recodified as §2.2-43.10, of the Virginia Public Procurement Act, requires that "no public body shall discriminate...because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law" of the bidder or offeror. Current State procurement policy is largely based on this Act, which is discussed in detail later in this report. Other statutory language prohibiting discrimination has been added periodically to the *Code of Virginia*.

Current provisions of Virginia law prohibit both discrimination and preference. Agencies are required to solicit bids from minority companies, but the award of contracts is generally done on the basis of a low bid. The Department of General Services (DGS) oversees procurement practices and policies. Reporting requirements are in place for the Commonwealth to monitor the level of participation in State contracts on an annual basis. These reports are administered by the Department of Minority Business Enterprise. The State Comptroller assists in correlating information with the Commonwealth Accounting and Reporting System (CARS).

Public Procurement Policies in Virginia:

In response to the absence of a comprehensive review of the Commonwealth's public procurement laws, the 1979 session of the Virginia General Assembly adopted Senate Joint Resolution No. 148 which authorized a study of Virginia's procurement laws. The study concluded that Virginia's procurement statutes were "sprinkled throughout the *Code*, rather than located within one Title." Therefore, the study produced recommendations to establish a more cohesive and comprehensive public procurement policy.

Subsequently, the 1982 General Assembly created the Virginia Public Procurement Act in Chapter 7 of Title 11 of the *Code of Virginia*. The purpose of the Act was to establish comprehensive public policies pertaining to governmental procurement from nongovernmental sources. The recodified Section 2.2-4300 of the *Code of Virginia* enunciates the Commonwealth's procurement policy:

"...To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner . . . [and] that all qualified vendors have access to public business . . . it is the intent of the General Assembly that competition be sought to the maximum feasible degree. . .that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered."

Promoting competition and acquiring goods and services from the lowest responsive and responsible bidder are emphasized in the Act.

In addition, the Act prohibits discrimination and promotes the inclusion of minority-owned businesses in the State procurement process. However, not all public procurement policies have guidelines in the area of minority-owned business participation to include such notable exceptions as the Capital Outlay Manual.

Statutory Provisions Relating to Non-Discrimination and Minority Business Participation

The Virginia Public Procurement Act emphasizes competition. The Act specifies that unless exempted elsewhere, transactions entered into by public agencies and institutions for the acquisition of goods, services, construction, and insurance must be obtained through a competitive process. Section 2.2-4318 of the Act, specifically provides that "Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted. . ." The creation of a policy concerning the acceptance of the lowest responsible bidder emphasizes the intention of the Act, to include responsible bidders, persons with the capability to perform fully the contract requirements and the moral and business integrity and reliability which assure good faith performance, offering the lowest bid, and assisting public bodies in obtaining high quality goods and services at reasonable prices. In the State's effort to seek the lowest responsible bidder, minority-owned businesses do not receive any consideration on the basis of being minority-owned firms.

Therefore, a minority-owned business must demonstrate by its submission that it is a responsible bidder and will receive State contracts only when the firm offers the lowest price. This is standard in the majority of procurement activities. Although State procurement policy emphasizes competition resulting in the selection of the lowest responsible bid and does not give minority-owned businesses any preference in this selection process, elements of State policy exist to ensure that minority-owned firms are not discriminated against in the process. Under current Virginia law, provisions exist prohibiting both discrimination and preference in awarding contracts to minority businesses. Agencies are required to solicit bids from minority companies, but the award of contracts is generally done on the basis of a low bid. Furthermore, the Virginia Public Procurement Act sets out:

- (1) the prohibition of discrimination by a public body;
- (2) the establishment of programs to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions; and
- (3) the prohibition of discrimination by a contractor.

Section § 2.2-4310 of the Public Procurement Act requires that "...no public body shall discriminate because of the race, religion, color, sex, national origin, age, disability, or any other basis..." of the bidder or offeror. In 1984, the section was amended to include the following phrase: "...Whenever solicitations are made, each public body shall include businesses selected from a list made available by the Department of Minority Business Enterprise." In addition, this section of the Act states:

"All public bodies shall establish programs consistent with...[all provisions of the Virginia Public Procurement Act]...to facilitate the participation of small businesses and

businesses owned by women and minorities in procurement transactions. The programs established shall be in writing and shall include cooperation with the Department of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies.”

In 1984, the language in this section was changed from “may” to “shall establish programs.” That same year, a section was added requiring State agencies to submit annual progress reports on minority business procurement to the Department of Minority Business Enterprise.

Although public bodies are required to help facilitate the participation of minority-owned businesses in public procurement, agencies are not required to award contracts based on this identification. Moreover, in order to receive awards with the State, solicited minority-owned businesses must prevail in the regular competitive procurement process. The Act also prohibits employment discrimination by a contractor. Section 2.2-4311 of the Act requires that during the performance of a contract of more than \$10,000:

“The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor...”

By statute, in all solicitations or advertisements for employees, the contractor is required to state that he is an “equal opportunity employer.”

References to anti-discrimination in contracting pre-date the Virginia Public Procurement Act and are available in additional sections of the *Code*. Sections 2.1-374 through 2.1-376 established the Virginia Fair Employment Contracting Act, the precursor to the Virginia Public Procurement Act. The Virginia Fair Employment Contracting Act, enacted in 1975, required that a contractor not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin, except where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor.

At that time the Act stated that nothing contained in the Virginia Fair Employment Contracting Act shall be deemed to empower any agency to require any contractor to grant preferential treatment to, or discriminate against, any individual or any group because of race, color, religion, sex or national origin on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by such contractor in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community or in the Commonwealth.

In 1980, the Act (still prior to the Virginia Public Procurement Act) was amended to prohibit discrimination in the awarding of State contracts. The recodified Section 2.2-4310 of the Virginia Public Procurement Act states that “In the...awarding of contracts, no public body shall discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law...”

Minority Procurement in State Government:

Unfortunately, there is very little oversight of agency compliance with the general policy of the Commonwealth with regard to effective and demonstrated minority supplier programs. Accordingly, in the absence of effective accountability for appointed executives in state agencies, there are no repercussions for noncompliance with existing State guidance. Information on minority supplier participation generated by the State's reporting system is not accurate, timely, or widely disseminated.

Department of Minority Business Enterprise

The Director of the Department of Minority Business Enterprise serves as a special assistant to the Governor for minority enterprise as specified in the *Code*, as has been the case since the original office was created in 1972 before the Cabinet structure of State government. The additional powers and duties of the Department include:

1. Coordinate as consistent with law the plans, programs and operations of the State government that affect or may contribute to the establishment, preservation and strengthening of minority business enterprise.
2. Promote the mobilization of activities and resources of State and local governments, businesses and trade associations, universities, foundations, professional organizations, and volunteer and other groups toward the growth of minority business enterprises, and facilitate the coordination of the efforts of these groups with those of State departments and agencies.
3. Establish a center for the development, collection, summarization, and dissemination of information that will be helpful to persons and organizations throughout the nation in undertaking or promoting the establishment and successful operation of minority business enterprise.
4. Within constraints of law and availability of funds, and according to the Director's discretion, provide technical and management assistance to minority business enterprises, and defray all or part of the costs of pilot or demonstration projects that are designed to overcome the special problems of minority business enterprises.
5. Manage the Capital Access Fund for Disadvantaged Businesses created pursuant to §2.2-2311 of the *Code of Virginia*, and, in cooperation with the Small Business Financing Authority, determine the qualifications, terms and conditions for the use of such Fund.

Certification:

The Department of Minority Business Enterprise is responsible for certifying businesses to participate in the Commonwealth's minority business program defined in the *Code of Virginia* and 7 VAC 10, which establishes reasonable regulations in accordance with the Administrative Process Act (§2.2-4000 et seq.) to implement a certification program for minority business enterprises.

According to the *Code*, minority business enterprise means a business enterprise that is "owned and controlled by one or more socially and economically disadvantaged persons." A number is assigned to businesses meeting certification requirements which is valid for two years from the date of approval. A recertification procedure is initiated prior to the expiration date.

The Certification Unit, located within the Department of Minority Business Enterprise, has a Service Division that is responsible for certification, procurement and a plan room. The plan room houses blue prints for public construction and highway construction programs which may be viewed by minority firms. The certification unit processes applications for minority businesses to participate in the Commonwealth's minority business program. Their mission is to promote the growth and development of the Commonwealth's minority and disadvantaged business sector.

Other Service Division Programs:

In addition to implementing the certification program, other Service Division programs include, but are not limited to, the following:

- coordinate the annual agency procurement reporting and forecasting programs,
- produce or host conferences and trade shows, and networking events

- provide direct marketing assistance, management assistance, business assessment, and training
- offer procurement and proposal development services and workshops
- loan package review
- assist with business plan development and providing technical/accounting assistance
- publish a monthly opportunity bulletin
- maintain the state plan room and listing of procurement opportunities other than construction
- assist State agencies and institutions with their minority procurement plan

Department Duties:

Section 2.2-1403 of the *Code* states the powers of the Director and provides that the director, as deemed necessary or appropriate to better fulfill the duties of the Department, may:

1. With the participation of other state departments and agencies develop comprehensive plans and specific program goals for the minority enterprise program; establish regular performance monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of federal and State support in achieving objectives.
2. Employ the necessary personnel and/or subcontract according to his discretion, with localities to supplement the functions of business development organizations.
3. Assure the coordinated review of all proposed State training and technical assistance activities in direct support of the minority enterprise program to ensure consistency with program goals and to avoid duplication.
4. Convene, for the purposes of coordination, meetings of the heads of departments and agencies, or their designees, whose programs and activities may affect or contribute to the purposes of this chapter.
5. Convene business leaders, educators, and other representatives of the private sector who are engaged in assisting the development of minority business enterprise or who could contribute to its development, for the purpose of proposing, evaluating or coordinating governmental and private activities in furtherance of the objectives of the chapter.
6. Provide the managerial and organizational framework through which joint undertakings with state departments or agencies or private organizations can be planned and implemented.
7. Recommend appropriate legislative or executive actions.
8. Adopt reasonable regulations in accordance with the Administrative Process Act (§2.2-4000 et seq.) to implement a certification program for minority business enterprises, such certification process shall include consideration of other states' laws that may deny like certifications to Virginia-based business enterprises based in that state.
9. Establish an interdepartmental board in accordance with §2.2-1404 of the *Code of Virginia* to supply the Director with information useful in promoting minority business activity.

Assistance Provided by State Agencies and Institutions:

The Interdepartmental Board established by the Director shall be composed of heads of the several departments and agencies of state government or their respective designees, whose functions affect minority business enterprise. The participating departments and agencies shall be determined by the Director. The Board is charged with supplying the Director with information useful in promoting minority business activity.

The head of each participating state department and agency or their designees shall furnish information, assistance, and reports to, and shall otherwise cooperate with, the Director in the performance of his duties as needed.

The head of each participating state department or agency shall, when so requested by the Director, designate an assistant or such other similar official to have primary and continuing responsibility for the participation and cooperation of that department or agency in matters concerning minority business enterprise.

Each participating state department or agency shall, within constraints of law and availability of funding, continue all current efforts to foster and promote minority business enterprises and to support the minority business program, and shall cooperate with the Director in increasing the total state effort.

Directors Responsibility for Recommendations and Reporting:

The Director shall submit to the Governor his recommendations for legislation or other action as he deems desirable to promote the purposes of this chapter. The Director, with the assistance of the Comptroller, shall develop and implement a systematic data collection process that will provide information for a report to the Governor and General Assembly on state expenditures to minority business enterprises during the previous fiscal year.

List of Certified Minority Owned Businesses:

The Department of Minority Business Enterprise produces a list of certified minority-owned businesses to promote the successful operation of minority business enterprises. State agencies are required by §2.2-4310 of the *Code* to include in **solicitations** "businesses selected from a list made available by the Department of Minority Business Enterprise." In Appendix A of the Agency Procurement and Surplus Property Manual, **solicitation** is defined as "An Invitation for Bids (IFB), a Request for Proposals (RFP), telephone calls, or any other document issued by the state to obtain bids or proposals for the purpose of entering into a contract."

As of November 2001 the Department of Minority Business Enterprise list of certified minority businesses included 1,213 minority businesses. This total included 400 minority firms from the Virginia Department of Transportation certification list. The list is intended for use by each State agency and institution in its efforts to comply with the discrimination prohibition of §2.2-4310.

The last time the list was distributed was in January 2001 by CD Rom. Calls made to the Department to locate minority firms for inclusion in two separate solicitations during the summer took an average of three days to receive an answer.

The Department of Minority Business Enterprise also works with the Virginia Department of Transportation (VDOT) to support VDOT's Disadvantaged Business Enterprise and Women-owned Business Enterprise programs. Since 1996, the DMBE has received a major portion of its annual appropriation from VDOT funds. The two agencies have a Memorandum of Agreement, which details areas where the DMBE has agreed to support VDOT minority business enterprise (MBE) programs.

Virginia Department of Transportation Program

The Virginia Department of Transportation (VDOT) is responsible for the construction, maintenance, and administration of the third largest state-maintained highway system in the nation. It is the largest procurer of minority business of any State agency. This is from two areas of procurement:

- 1 highway construction funded by Federal highway dollars
- 2 state funded procurements.

Legal Implications:

The practical effect of *Adarand* will be to subject federal procurement programs to the strict scrutiny standard. Contracts structured in the manner that prompted *Adarand* are not used by Virginia agencies or VDOT. The VDOT program is based on a competitive process among subcontractors and no bonuses or special compensation are offered to prime contractor for the use of disadvantaged business enterprise (DBE) firms.

The 1982 Surface Transportation Assistance Act (STAA) was signed into law on January 6, 1983. Section 105(f) of the Act contained three significant elements:

- 1.) It gave departments of transportation minority business enterprise program a statutory authority;
- 2) Established a 10% goal for program participation for minority business enterprise only;
- 3) Based eligibility on social and economic disadvantage rather than just ethnic and cultural disadvantage -- hence the historic name change from "minority" to the "disadvantaged" business enterprise (DBE) program.

The Surface Transportation Uniform Relocation Assistance Act (STURAA) was passed on April 1987. Section 106(c) of STURAA replaced section 105(f) of STAA as statutory authority for the DBE program. STURAA had 5 major provisions:

- 1) Continued the 10% DBE participation goal;
- 2) Made women part of the presumptive disadvantaged group;
- 3) Set size standard limitation for DBEs at \$14 million over 3 years;
- 4) Required uniform certification criteria and on-site reviews;
- 5) Required recipients to update their directories of eligible DBE firms annually, including location

In 1987, VDOT set a higher goal of 12 percent, which it kept until July 31, 1995, when it lowered the department's voluntary numerical target to 10 percent. On August 2, 1995, VDOT revised its State program for "Use of Minority Business Enterprise." The new policy alters language stipulating that contractors working on State programs "shall take all necessary and reasonable steps to ensure that MBEs have the maximum opportunity to compete for and perform work on the contract." It replaces this language with "the contractor is encouraged to take necessary and reasonable steps to ensure that MBEs have the maximum opportunity to compete for and perform work on the contract, including participation in any subsequent contracts."

Other changes to the policy include the substitution of "is encouraged" for "shall" and the replacement of the words "affirmative action" with "reasonable steps." VDOT's current annual DBE goal is 10.5% for the federally funded program in order to meet the requirements of the Federal Highway Administration Disadvantaged Business Enterprise regulations (49CFR Part 26).

The goal setting methodology takes in several factors to arrive at the percentage. The goals are targets that organizations can use to gauge their performance and as such make appropriate changes in a timely manner. According to Department of Minority Business Enterprise records, VDOT's State projects were getting approximately 6 percent minority participation several years ago without enforcement criteria in the program. VDOT's State projects are now getting approximately 2 percent minority participation.

State Procurement of Goods and Services from Minority-Owned Businesses

The State is party to many contracts with businesses each year. However, accurate and comprehensive information regarding payments made to minority-owned businesses and data regarding State procurement activities with minority firms are not readily available on a timely basis. Improvements in reporting that were made as a result of the JLARC 1996 report concerning the Department of Minority Business Enterprise have helped. Significant work must be done, however, to achieve a timely and useful report regarding payments made to minority-owned business system.

The following chart lists Virginia's expenditures for the last three years and details the percentage of minority participation in contract expenditures. The list contains the total minority expenditure and percentage as well as a percentage of expenditures for the Department of Minority Business Enterprise certified list. The fiscal year 2001 report has not been published as of December 2001, some six months after the close of the fiscal year.

Table 1
Virginia Expenditures with Minority Owned Businesses

Source: Department of Minority Business Enterprise Annual Reports

FY	State Total Expenditure	Total Minority Expenditure	Minority Percentage of Total Expenditure	Minority Percentage based on DMBE Certified List
98	\$3,034,407,069	\$202,597,850	6.68 %	2.78%
99	\$4,218,673,719	\$302,022,887	7.16%	2.05%
00	\$4,059,858,108	\$276,148,517	6.08%	2.08%
01	Not Available			

The information contained in this table was obtained from the Annual Reports prepared by the Department of Minority Business Enterprise and the Comptroller. The percentage of State agency expenditures with minority firms, on the Department's certified list, is compiled from reports of the Department and the Office of the State Comptroller using a computer match of Federal Identification Numbers and the Commonwealth Accounting and Reporting System (CARS) report of payments. Please note that the annual reports are not usually available until at least five months after the close of the fiscal year. They are distributed to the Governor and the General Assembly and are not available to agencies and institutions except by special request.

The relatively low percentage of expenditures based on the certified list is distressing. It points to several issues in the current procurement and certification programs and the duplication of certification lists throughout the Commonwealth. This will be discussed in the context of information developed in the public meetings conducted by the Commonwealth Competition Council Task Force. A complete discussion of the public meetings is found under Appendix A.

Department of Minority Business Enterprise Certification List:

There has been tremendous growth in the number of minority and women-owned businesses in Virginia. The Department of Minority Business Enterprise has the sole responsibility in the State to produce a certified list of minority-owned businesses. State agencies are required by §2.2-4310 of the *Code* to include in solicitations "businesses selected from a list made available by the Department of Minority Business Enterprise." The list is intended to be used by each public body in its efforts to comply with the State's minority procurement policy guidance in our various public laws.

A second point of view is the relative low number of certified firms in the Department of Minority Business Enterprise data base. Currently, the Department of Minority Business Enterprise has **1,213** firms on the certified list, down by 287 from 1974. This does not appear to be reflective of the large increase in the number of minority businesses in the State in the last 15 years.

Moreover, it appears the Department of Minority Business Enterprise has had difficulty in publishing the certification list back as far as 1993 time period. The last public distribution of the certified list was January 2001 when it was distributed to agencies of the Commonwealth by CD Rom. The department's web site lists the certification page as under construction. The memorandum of understanding with Christopher Newport University to develop a web site for the department did not contain a requirement for a certification web page. Only recently has the department entered negotiations with the Virginia Information Providers Network at the urging of the Task Force chairwoman to develop a needed certification web presence.

The Virginia Department of Business Assistance publishes a web-based women's certification list and the Economic Bridge web site at Radford maintains a certification list for minority and women-owned firms. The information for the lists is assumed to come from the Department of Business Assistance which provides the women-owned firms list from its data base and forwards information from the Department of Minority Business Enterprise.

Annual Report of Minority Participation in Key Categories of State Spending:

While an annual report of total State spending indicates the magnitude of minority participation, a monthly analysis of minority and women-owned business spending may ultimately be more useful by all State agencies. This would enable the organizations to assess their compliance with existing State law on a real time basis. Furthermore, it would enable the respective programs to take timely action to address participation of small businesses and businesses owned by women and minorities in their procurement transactions.

The Comptroller and the Department of Minority Business Enterprise prepare the annual report by matching certified minority businesses by their Federal Identification Number with the agency payment transactions in the Commonwealth Accounting and Reporting System. This is similar to the way private sector business accounts for their 1st tier supplier diversity transactions on a monthly basis. However, there does not appear to be any technology based system in place in Virginia to capture 2nd tier spending.

Improved Data Base and Methodology Needed to Assess Minority Procurement:

The *Code of Virginia* §2.2-4310 requires the Department of Minority Business Enterprise to provide a list of certified businesses whenever a public body makes solicitations. There have been continuing reports of difficulty obtaining this list on a timely manner. Many agencies have resorted to maintaining their own lists because of this fact.

The University of Virginia and Virginia Commonwealth University have an extensive list of minority firms. The fact that many agencies are able to identify minority businesses would seem to indicate the general availability of minority businesses to provide goods and services to the State.

The Department of Business Assistance maintains a women-owned business certification list. This is a self-certified list and is not provided for in the *Code of Virginia*. State agencies and institutions may have used goods and services from women-owned firms on this list believing the firm is a State certified woman-owned business. Additionally, those procurements may not be reflected as expenditures with disadvantaged business enterprises in the annual report unless the woman-owned business has also been certified by the Department of Minority Business Enterprise.

The Agency Procurement and Surplus Property Manual Section 3.10 directs agencies and institutions to maintain a listing of minority and female vendors for solicitation purposes which is contrary to § 2.2-4310 in the *Code of Virginia*.

Consolidation of all these lists by the Department of Minority Business Enterprise in an automated format would greatly enhance the ability of State agencies to locate minority businesses. It would also help local governments and regions where agencies reported difficulties. Furthermore, it would eliminate the extensive duplication of effort to maintain the respective lists.

Further evidence of the need to expand and improve the accuracy of the Department of Minority Business Enterprise list can be seen in the number of certified matches in the annual reports as compared to the total number of minority firms shown in Table 1.

In addition, consolidation of the minority lists will provide more accurate data and information concerning State procurement activities with minority-owned businesses. Similarly, the reporting process in its current form has often resulted in inaccurate reporting, duplication of effort, and inefficiency. Changing the reporting process to facilitate the transfer of CARS data on State agencies to the Department of Minority Business Enterprise in an automated form rather than in the present manual or hard copy formats could significantly reduce data entry and processing workloads at state agencies and the Department of Minority Business Enterprise.

Furthermore, compiling and submitting the minority procurement reports in an automated manner would result in more timely and accurate reporting of that data. Additionally, an electronic customer satisfaction e-mail could be sent to users of the data base. This would provide immediate data to enhance the usability of the data base by the Department of Minority Business Enterprise.

Conclusions

All State agencies, but particularly the Department of General Services' Division of Purchases and Supply and the Department of Minority Business Enterprise have statutory responsibilities in facilitating the establishment, preservation, and strengthening of minority business enterprise. The Department of Minority Business Enterprise certification program is not well developed. Minority businesses reported difficulty in attaining certification. Moreover, the number of businesses on the certified list does not appear to reflect the diversity of Virginia's business community.

Minority-owned businesses rely on agencies' implementation of minority business related policies (primarily solicitation requirements) in their efforts to compete for business with the State. Therefore, when the implementation, oversight, or reviews of minority business policies are not complete or comprehensive, the solicitation of minority-owned businesses may not occur as required.

State agencies with minority-owned business oversight responsibilities need to increase their oversight efforts, improve coordination, and further develop automation capabilities in order to provide the needed direction and resources. Although it appears that DGS/DPS has implemented an extensive program for procurement review, the review process does not specifically address statutorily required minority procurement activities. Reviewing State agency minority business procurement activity during existing DPS reviews would help monitor the efforts of State agencies in adhering to the State's policies in the area of minority business development. The Department of Minority Business Enterprise is a good resource to assist DGS/DPS in the review.

Business Supplier Diversity Program Best Practices Compared to the Commonwealth's Requirements and Practices in Minority Procurement

The following table lists the key elements of business supplier diversity program best practices. The left column lists the business best practices reported by the Philip Morris, Dominion Resources and Bon

Secours Hospital. The right column and provides a *Code of Virginia* reference or a discussion of the Commonwealth's current practices.

Table 2
Supplier Diversity Program Best Practices
Compared with Commonwealth of Virginia Practices

Corporate	Commonwealth
CEO Policy Statement	General statements/ <i>Code of Virginia</i> Requirements
Certification Site 24x7 listing firms	Not at Present. Limited Data base Department of Minority Business Enterprise (DMBE)
Supplier Diversity Plan	<i>Code of Virginia</i> §2.2-4310 Agencies Required to Prepare Plan: Not fully implemented
Monthly Reporting Tier 1 & 2	None: Annual Report <i>Code of Virginia</i> § 2.2-1405
High Level Organizational Input/Monitor Management Understanding/Support	<i>Code of Virginia</i> §2.2-1404 Interdepartmental Board Not implemented
Supplier Diversity Champions	<i>Code of Virginia</i> § 2.2-1404 C. Designate individual with primary and continuing responsibility in each department. Not Implemented
Continuous Improvement/No set asides	Vague language Agency Procurement and Surplus Property Manual (APSPM) No set asides
Incorporate MBE in Purchasers Performance Appraisal	No general policy to include MBE evaluation in annual performance appraisals
2 nd Tier Program Support	Some Language in APSPM
Good budget to support supplier diversity program	Appropriation Act splits DMBE funding between General Fund and Virginia Department of Transportation (VDOT)
Strategic Alliances	PACE program jointly administered

When both columns are compared, it is apparent that the Commonwealth generally has the best practice components in law and regulation to conduct a successful supplier diversity program. The General Assembly has set the standard in existing law. Areas where improvement is needed are in bold.

The Department of Minority Business Enterprise must demonstrate leadership and significant improvement in the core mission function of certification in the next six months. The certification program is a regulatory function of government. The department's failure to take advantage of existing *Code* requirements may be cause for considering other options for the certification program to include outsourcing the function or reassigning it to another department.

Other immediate actions include the implementation of the Interdepartmental Board and requesting agency representatives to act as supplier diversity champions as permitted in current law. This will add over 100 individuals in support of the State's diversity program. Extensive training resources exist in the Commonwealth to assist developing businesses. Leveraging the existing multiple sources of training and acting as a referral center further expands the Department of Minority Business Enterprise ability to serve the minority community needs without added funding.

The existing *Code* requirements need to be implemented in a manner commensurate with importance the private sector attaches to their supplier diversity programs. Action is required by every agency and institution in the Commonwealth. A monthly report of tier 1 and 2 procurement expenditures is needed by management to measure the effectiveness of their supplier diversity programs. The mechanics are in place to capture the dollars expended and to report on a monthly basis without "paper reporting."

The State cannot do business with every minority firm, so an expanded 2nd tier program to encourage the use of minority subcontractors and to report on their use is needed. This revised program would update the 1991 Secretary of Administration guidance in the Agency Procurement and Surplus Property Manual and add the requirement to the Capital Outlay Manual.

The minority community must also continue work to be responsive and responsible bidders on State solicitations. There are no set aside contracts and everyone has the opportunity to compete.

Recommendations

Recommendation (1): The Governor or the General Assembly may wish to recommend that § 2.2-1405 of the Code of Virginia be amended to provide for automated reporting and computer matching of minority participation reports from State agencies and institutions on a monthly basis and an annual summary report.

If enacted, the Department of Minority Business Enterprise and the Department of Accounts should develop a reporting methodology using a computer match of Federal Identification Numbers on the DMBE list matched to payments reported in the Commonwealth Accounting and Reporting System on a monthly basis.

The monthly report would be provided electronically to each agency with payments to minority firms reported that month. This will report 1st tier payments and improve the accuracy, timeliness, and usefulness of reports for minority procurement. A 2nd tier reporting system using a technology approach also needs to be developed and implemented based on current guidance in the Agency Procurement and Surplus Property Manual terms and conditions.

Changing reporting responsibilities and methodologies will address the extended time it takes to prepare the annual report. Furthermore, monthly reporting will enable State agencies and institutions to accurately measure their performance in supplier diversity procurement issues and to react as needed in a timely manner.

Recommendation (2): The Office of the Governor may wish to convene an inter-agency task force with directive authority to assist the Department of Minority Business Enterprise in implementing the recommendations contained in this report.

The statute currently calls for the Director of the Department of Minority Business Enterprise to establish an interdepartmental board (§ 2.2-1404 of the *Code of Virginia*) to promote minority business activity. In theory, this board could coordinate the merger of minority business lists and improved reporting. However, this board has neither been used nor is it currently in operation. In addition to the missed coordination opportunity and assistance, this raises another question.

The Director of the Department of Minority Business Enterprise's position is designated as serving as a special assistant to the Governor for minority enterprise. However, the department director is organizationally relegated to a lesser role when assigned to the Commerce and Trade Secretariat. Governor Holton's original memorandum contained special assistant language, but it predated the cabinet structure. The cabinet structure today may make it difficult for an agency head to be a special assistant to the Governor. This issue presents an apparent organizational conflict that needs to be resolved.

Additionally, the director is in a unique position to ensure the full cooperation and coordination needed to influence State supplier diversity activities across secretarial and departmental lines. An interagency task force can offer assistance to effect needed changes.

The task force should include, but not be limited to, representatives of the Offices of the Secretary of Administration, the Secretary of Commerce and Trade, the Secretary of Finance, the Department of Accounts, the Department of Minority Business Enterprise, and a representative of the legislative and

judicial branches. A representative of one of the Secretariats should chair the task force. The task force should address issues raised by this report to include identifying, using, and reporting 2nd tier minority businesses, the compilation and automation of lists, and other reporting issues to include resolving the apparent conflicts in identified procurement regulations and electronic Virginia. The task force may also need to prepare recommendations for any needed statutory modifications related to these issues.

Recommendation (3): State agencies and institutions should, as part of their annual performance evaluation, hold managers accountable for implementing policies and procedures in purchasing goods and services that are intended to achieve supplier diversity and to increase both the number of minority-owned and women-owned firms as well as the volume of business with them.

Minority firms are reliant on Virginia's public procurement process. The Virginia Public Procurement Act, §2.2-4310 A of the *Code of Virginia*, requires that whenever solicitations are made, each public body shall include businesses selected from a list made available by the Department of Minority Business Enterprise. The Agency Procurement and Surplus Property Manual defines solicitation as Invitation for Bids (IFB), Request for Proposals (RFP), telephone calls, or any other document issued by the State to obtain bids or proposals for the purpose of entering into a contract. In addition to support and assistance from the Department of Minority Business Enterprise, minority firms rely on State agencies and institutions to implement minority business related procurement policies.

State policies governing procurement of goods and nonprofessional services from minority-owned businesses are substantially the same as those policies governing procurement from all nongovernmental sources. Minority-owned businesses desiring to provide the State with goods and services are subject to the Virginia Public Procurement Act as are all other businesses. The Commonwealth does not give minority firms preference over non-minority firms competing for business with the State. However, the State has established provisions to ensure that minority-owned businesses both have opportunities to participate in the State's procurement activities and are not discriminated against during the procurement process.

State agencies and institutions contracting goods and nonprofessional services from nongovernmental sources must abide by established policies and procedures found in the Virginia Public Procurement Act, and procurement guidelines provided by the Department of General Services' Division of Purchases and Supply. None of the above-mentioned statutes or guidelines contains preferences, set asides, or quotas for minority-owned businesses.

However, various sections of the *Code of Virginia* prohibit discrimination on the basis of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law. Furthermore, State agencies provide guidelines, assistance, and training in the area of minority-owned business participation in the State procurement process. These agency functions are designed to enhance the State's policy of contributing to the establishment, preservation, and strengthening of minority-owned businesses. The implementation of these functions, however, does not always meet the intent of State policy. Consequently, both State agencies and minority-owned firms have voiced concerns over the lack of effort on the part of State agencies with procurement oversight responsibilities in promoting the participation of minority-owned businesses in the State procurement process.

Enhanced cooperation between State agencies with minority-owned business oversight responsibilities is necessary to effect compliance with statutes governing the establishment, preservation, and strengthening of minority-owned businesses. In addition, State agencies with oversight responsibilities in public procurement activities should:

- (1) incorporate review procedures for minority-procurement activity where this oversight is lacking, and
- (2) provide more complete, comprehensive, and reliable data on minority-owned business activity in State procurement.

Moreover, the lack of comprehensive data on minority-owned business activity in an automated form appears to serve as a constraint to minority-owned business activity in the public procurement process.

Recommendation (4): To provide better oversight on minority business activity in State agencies, the Department of General Services' Division of Purchases and Supply must consider increasing the level of importance attached to minority business procurement activity in its procurement review process.

Section 2.2.1111 of the *Code of Virginia* authorizes DGS and DPS to issue directives or memoranda on public procurement. In Section 2.16(d) of the Agency Procurement and Surplus Property Manual, DPS exercises this authority. Section 2.16(d) provides guidance in compliance with the Secretary of Administration's memorandum dated August 12, 1991.

This memorandum establishes guidelines for all procurements of goods, professional and nonprofessional services, construction, and insurance by competitive negotiation exceeding \$100,000 in value. The memorandum implements the policy of the Commonwealth to "contribute to the establishment, preservation, and strengthening of small businesses and businesses owned by women and minorities." In this case, the directives of the memorandum are not optional; rather, they are requirements. Guidelines for implementation of the memorandum state that the offeror must submit three sets of data for small businesses and businesses owned by women and minorities.

These sets of data are:

- (1) ownership,
- (2) utilization of such firms for the most recent 12 months, and
- (3) planned involvement of such firms on the current procurement.

In evaluating these proposals, DGS/DPS guidelines provide weights to be assigned to the offerors' past, current, and future efforts to utilize goods and services from such firms. The failure of an offeror to submit the required information will result in the removal of the offer from further consideration. An interesting fact of this policy however, is that a prime minority contractor responding to the solicitation does not receive any consideration as a minority business. To receive consideration discussed above, the minority prime would have to provide for the use of minority subcontractors.

Minority Business Procurement Activity Oversight:

Although State agencies with primary minority business solicitation responsibilities provide various forms of assistance in the State procurement process, some oversight mechanisms are necessary to enhance compliance with existing statutes. Procurement policies direct DGS/DPS and Department of Minority Business Enterprise to provide oversight in this process, and these agencies have some assistance, training, guidance, and review processes in place. However, some of these processes require additional oversight, coordination, or automation in order to ensure compliance with existing provisions of the *Code of Virginia*. The Department of General Services, Division of Purchases and Supply, is not responsible for certification of minority businesses.

DGS/DPS provides assistance and training to State agencies procuring goods and services and to vendors competing for State contracts. Subsequently, DGS/DPS publishes the Agency Procurement and Surplus Property Manual which provides guidelines for agencies in the area of public procurement activity under authority of § 2.2-1111 of the *Code of Virginia*. The manual covers areas such as procurement authority and responsibility, general procurement policies, methods of procurement, and procurement planning. State agency and institution staff uses the manual as a guide in numerous areas of public procurement. DGS/DPS publishes a similar manual for vendors who compete for contracts with the State.

Recommendation (5): The Department of General Services' Division of Purchases and Supply and the Bureau of Capital Outlay Management should clarify minority procurement policies in the DGS/DPS Agency Procurement and Surplus Property Manual, eVA , and the Capital Outlay Manual to resolve any apparent conflicts with the Virginia Public Procurement Act and functions of the Department of Minority Business Enterprise.

The Agency Procurement and Surplus Property Manual is published under the authority of § 2.2-1111 of the *Code of Virginia*. This section of the *Code* provides DPS with the authority it may:

“...make, alter, amend or repeal regulations relating to the purchase of materials, supplies, equipment, nonprofessional services, and printing, and may specifically exempt purchases below a stated amount or particular agencies or specified materials, equipment, nonprofessional services, supplies and printing.”

Through this manual, DPS sets forth policies and procedures to be followed by State agencies and institutions in fulfilling procurement responsibilities within their delegated limits.

Included in the procurement manual are provisions for the inclusion of minority-owned businesses in the procurement solicitation process. Statutory requirements for encouraging minority-owned business participation for competitive bidding and competitive negotiation are operationalized in Section 2.16 of the procurement manual.

State agencies are given guidelines on the number of minority firms that should be included in the solicitation process based on set dollar amounts. However, minority solicitation provisions are recommendations on what an agency should consider, rather than a statement of what an agency must consider.

The definition of solicitation would appear to require that whenever solicitations are made, each public body shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

The Agency Procurement and Surplus Property Manual, Appendix B, has terms and conditions pertaining to contracts issued by the State. Appendix B, Section 1 (C), sets forth the anti-discrimination requirements in the required general terms and conditions for goods and nonprofessional services. Section II sets forth special terms and conditions for a State contract. Item 36 establishes State policy for minority and women-owned businesses subcontracting and reporting:

“Where it is practicable for any portion of the awarded contract to be subcontracted to other suppliers, the contractor is encouraged to offer such business to minority and/or women-owned businesses. Names of firms may be available from the buyer and/or from the Division of Purchases and Supply. When such business has been subcontracted to these firms and upon completion of the contract, the contractor agrees to furnish the purchasing office the following information: name of the firm, phone number, total dollar amount subcontracted and type of product/service provided.”

Note when used: In solicitations over \$15,000 when subcontracting opportunities may exist.

Several of these references contain conflicting information with the requirements in §2.2-4310 of the *Code of Virginia*. Additionally, the new electronic Virginia (eVA) procurement system was not discussed in detail. However, eVA contains a minority certification screen, which does not appear to lead to the Department of Minority Business Enterprise and their certification program. This coordination needs to be completed as soon as possible.

The Task Force also reviewed the Capital Outlay Manual because it covers capital expenditures in the Commonwealth. The manual has anti-discrimination instructions at Section 325.0 and Section 331.0, and contains instructions for reports on the participation of small businesses and businesses owned by women and minorities for professional service contracts. The instructions to include minorities and women-owned firms in a solicitation as required by §2.2-4310 of the *Code of Virginia* does not appear to reflect the Commonwealth's stated policies as clearly as other publications such as the Agency Procurement and Surplus Property Manual.

Procurement Review. DPS has a procurement review program designed to ensure compliance with State procurement policies. Each year, DPS staff review selected State agencies for compliance with State procurement policies and procedures. Procurement review analysts follow set guidelines and procedures while attempting to record agency compliance with the Virginia Public Procurement Act and DGS/DPS policies and procedures related to the Act. Procurement reviews may result in recommendations for agency policy revisions, procurement training, increased procurement authority, or decreased procurement authority.

Although these reviews appear to be comprehensive in their public procurement oversight function, it does not appear that public procurement policies related to minority-owned business solicitation or participation are a major portion of the program.

Recommendation (6): The inter-agency task force identified in Recommendation 2 should review methods to increase vendor training. Training should include increasing minority firms' knowledge of the State procurement process and methods of doing business with the State.

In meetings and interviews with minority business owners, they discussed their concerns about not being able to secure business opportunities with the State. Some of their problems can be attributed to the absence of a comprehensive list of minority vendors in the Commonwealth. However, other shortcomings, which include minority firms declining to identify themselves as minority firms or declining to register with State agencies as minority firms, should also be taken into account when examining a lack of participation.

Minority business owners stated that they feel as if they are "outsiders" in the State procurement process. Furthermore, vendor training programs apparently have been discontinued in the DGS/DPS Vendor Development Section. In order for minority firms to participate in the State procurement process to the fullest extent possible, these issues, and other related issues, should be addressed.

There are extensive training resources available for businesses throughout the Commonwealth, to include minority and women-owned firms. The Department of Minority Business Enterprise would be better served to be a training resources referral agency. This clearinghouse for training would leverage the statewide resources to meet all minority and women-owned requests.

Recommendation (7): The inter-agency task force identified in Recommendation 2 should identify mechanisms for eliminating duplication of all certification lists and increasing cooperation between agencies with minority procurement oversight, review, certification, and registration responsibilities.

The Department of Minority Business Enterprise was established to assist in the promotion and development of minority business enterprises. The department does not monitor agency compliance with the Virginia Public Procurement Act or DGS/DPS guidelines. The department is required to develop and distribute the Commonwealth's official list of certified minority-owned businesses.

The current list of certified and non-certified minority firms under represents the total number of minority firms doing business with the State. Despite having problems identifying minority businesses, very few State agencies and institutions have requested assistance from the Department of Minority Business Enterprise. The minority certification program is a public regulatory function and is crucial in the development of a viable supplier diversity program.

In addition, the department is authorized by statute to collect, evaluate, and report on data involving minority business activity. Also, procurement policy directs the department to coordinate programs and operations which contribute to the establishment, preservation, and strengthening of minority businesses. The existing statutes are designed to assist the Commonwealth in monitoring the level of minority-owned business participation in State contracts.

State Agency Progress Reports:

The Department of Minority Business Enterprise is directed to coordinate programs and operations that contribute to the establishment, preservation, and strengthening of minority business enterprise as noted above. As a part of this effort, the department is required to collect data on minority-owned business activity. However, a Joint Legislative Audit and Review Commission (JLARC) 1996 review of the Department of Minority Business Enterprise found that data was lacking. The JLARC staff requested data from these reports for fiscal year 1994 and fiscal year 1995, and in both instances reports were incomplete.

Apparently, the Department of Minority Business Enterprise had requested that agencies not submit fiscal year 1995 reports until the department had revised the report submission process. It also appears that State agencies were not aware of this change. A review of the department's reports for fiscal year 1998 through fiscal year 2000 reflects some improvement; however, they are compiled on an annual basis and not available until six months after the end of the fiscal year. The fiscal year 2001 report was not available for inclusion in this report.

As demonstrated earlier, agency procurement personnel are sometimes unclear as to the State's policies regarding minority solicitation procurement. Added emphasis concerning compliance with the State's minority solicitation requirements can improve the State's supplier diversity program.

Recommendation (8): The Department of Minority Business should complete the Internet data base in six months to include incorporation of all lists outstanding in the Commonwealth.

The Department of Minority Business Enterprise is the State agency directed by the *Code of Virginia* to certify or register minority firms. Several State agencies and institutions maintain their own list of minority firms. The Virginia Department of Transportation has certification requirements for disadvantaged minority business and maintains a web-based list program in order to meet the requirements of the Federal Highway Administration Disadvantaged Business Enterprise regulations (49CFR Part 26). Under the current system, minority-owned firms are in several databases and may or may not be on the Department of Minority Business Enterprise data base.

The Agency Procurement and Surplus Property Manual directs State agencies to maintain their own list of firms. Under the current system, State agencies consult their own list or lists provided by the Division of Purchases and Supply, Virginia Department of Transportation, Department of Minority Business Enterprise, Department of Business Assistance, the Economic Bridge, or other assorted lists that are available on the Internet. The construction of a single certified data base as set forth in the *Code of Virginia* should not be difficult and would benefit all State agencies, local government, and businesses desiring certification information to support their diversity programs.

The minority solicitation efforts of State agencies will be enhanced when the Department of Minority Business Enterprise implements the planned Internet-based certification program. When implemented, other lists are not needed. A web-based certification application will assist the minority business community. When the certification lists are on the Internet, they can be readily updated and be available on a 24x7 basis. As a result, minority-owned businesses can expect increased opportunities to compete fairly for State business.

Increased automation by DGS/DPS and the Department of Minority Business Enterprise can better implement the State's intent to assist in the development of minority businesses. The electronic Virginia

procurement system can fulfill this function; however, minimal coordination has occurred between the two departments concerning the certification aspects of eVA.

Recommendation (9): The Governor or the General Assembly may wish to consider changing the name of the Department of Minority Business Enterprise to reflect the promise of equal and greater opportunity for all Virginians.

The burgeoning global marketplace places new requirements for cross-cultural literacy and openness to change and flexibility. Recent census data clearly indicates a seismic demographic shift in Virginia's marketplace which will extend over the next few decades. Virginia has ridden a wave of unprecedented growth and our citizens expect this to continue. The Commonwealth is moving forward beyond the divisions of the past. This promises equality and a greater opportunity for all Virginians. A new department name, such as the Department of Supplier Diversity, reflects this growth trend and a focus on the future.

Appendices

Public Fact Finding Meetings

An initial meeting was held with the Director of the Department of Minority Business Enterprise after coordinating with the Secretary of Commerce and Trade. This meeting gathered initial information and set the agenda for the study. The Task Force was informed that the Department had a memorandum of understanding with Christopher Newport University for redesign of the Department's web presence. Examination of the MOU revealed that it did not include a certification site, which is also lacking on the current department web site.

First Meeting:

The first meeting focused on the Department of Minority Business Enterprise as well as several State agencies. The Department of Minority Business Enterprise briefing focused on broad missions, definitions, and processes for the department. There was some discussion of the agreement between the Department and the Virginia Department of Transportation.

Other agencies and institutions included Virginia Commonwealth University, Virginia Department of Transportation, the Division of Purchases and Supply in the Department of General Services, as well as the Virginia Regional Minority Supplier Development Council. Local government was represented by the City of Richmond.

The **Virginia Department of Business Assistance** reported on their efforts to assist businesses through the Small Business Development Centers. The department has a web-based women's self certification program. A \$75 fee is charged.

The **City of Richmond Office of Minority Business Enterprise** representative stated they did not do certification because they don't have the manpower to do it and the City signs hundreds of contracts a year. They do attempt to use the VDOT and Department of Minority Business Enterprise certification lists although they questioned the number of firms listed.

They stated that certification is a critical part of what they do each day and, in fact, is a central function because they must know whom and where the MBE and DBE's are if they are to carry out the other elements of their work.

MBE availability is so important the office commissioned a "2001 Availability Analysis" study to find out which minority-owned businesses are in the Richmond area and what kinds of goods and services they can supply which are most often purchased by the city. They discovered that only 23% of the businesses that considered themselves MBE were certified with the State Department of Minority Business Enterprise. Additionally, most were neither registered with the City of Richmond Office of Minority Business Enterprise nor with the Virginia Regional Minority Supplier Development Council or the Metropolitan Business League.

The study, conducted by the City of Richmond Office of Minority Business Enterprise, yielded a local listing of over 800 firms who classified themselves as minority businesses. Absent any further data, there is the likelihood that many of those responding might not be "minority" businesses. This results in minority participation numbers that are often unverifiable without significant additional review.

There are many reasons for this. MBEs often don't take the time to get certified because of the costs in terms of the day-to-day demands of running a business with few employees and they think they can spend

the time more productively. It is a question of the return on effort. Will certification lead to real contract opportunities or just another good faith effort on the part of the city?

Still others question whether or not they even want to be known as an MBE given the negative connotation that has unfortunately been attached to that designation. If one accepts the notion that MBEs have less access to contract opportunities and that is the norm, MBEs have less capacity than non-MBEs and have been victims of active and passive discrimination. It seems the answer is to produce the infrastructure needed to eliminate these impediments.

Most public entities now have some kind of fair contracting language in their purchasing policies or follow the State's Public Procurement Act. Those purchasing policies are operationalized through a set of procedures. Even when those policies are not as aggressive or effective as some would like, the fact remains that those policies are in place and with the intent of helping the local MBE community. It follows that knowing who is a legitimate MBE is central to effective programming.

From the vantage point of the City of Richmond Office of Minority Business Enterprise, there has never been a more important time than now to identify and certify minority firms because of the amount of business activity scheduled to take place in the metro-Richmond area over the next few years. When you overlay those projections with the fact that the MBE community only makes 1.3% of the sales, you have an equation for increased widening of the economic gap between communities. This does not make for good economic policy or practice. Nor does such low MBE participation promote the Commonwealth's goal of competitive government.

We have a window of opportunity. Efforts are in place by Richmond Renaissance⁶, the Central Virginia Business and Construction Association, the Metropolitan Business League, the Virginia Regional Minority Supplier Development Council, and members of the Associated General Contractors, to lead to increased opportunity in the public and private sectors for minority businesses. In addition, the City of Richmond Office of Minority Business Enterprise sees movement by the surrounding counties as it relates to establishing fair contracting policies and practices for all.

Many of the participants in this study are governmental agencies, major⁷ businesses, and owners, who have expressed a sincere interest in expanding their base of minority suppliers at all levels.

"It starts with certification!"

Certification is a rigorous process, and it must therefore be funded at a level that is reasonable. The agency that is conducting certification must be organized around that fundamental responsibility. Information received during the certification process can be leveraged in a number of ways including a proactive approach to technical and management assistance.

Useful certification information must be made available on demand. The easiest way to do this is by making it available via the Internet. In addition, that information has to be made available where it can have the most impact, namely with the buyers, general contractors, and prime contractors looking for MBEs. A regional search format is needed to cover the entire State and offer the service to local governments throughout the Commonwealth.

Lastly, the system must be user friendly and as non-intrusive as possible. If there is a way to reduce the amount of paper individuals need to file, it should be done. This can be done by an e-commerce

⁶ Richmond Renaissance is a public/private non-profit partnership whose mission is the development of Downtown Richmond. It has an active African-American Economic participation program designed to improve minority business participation in the economic growth of the City and the region.

⁷ In all instances, the use of the word major business, prime contractors, or majority contractors/businesses refers to white-owned or controlled business and government.

arrangement or by simply reducing the number of pages in the application to the minimum essential for certification as required by law. If you do not absolutely need the information, do not ask the question.

The Division of Purchases and Supply discussed the requirements of the Virginia Public Procurement Act, §2.2-4310 of the *Code of Virginia*, concerning prohibited discriminated and participation of small and minority-owned business. The Agency Procurement and Surplus Property Manual requirements of Chapter 3.10, contains guidance concerning general procurement policies for minority and women-owned business. The citation requires solicitations from \$5,000 to \$15,000 contain two minority/women owned business, and solicitations \$15,000 to \$50,000 contain four minority/women owned businesses. Chapter 6, Competitive Sealed Bidding, and Chapter 7, Competitive Negotiation, require that solicitations over \$50,000 contain a listing of six minority/women-owned businesses.

The Vendors Manual Chapter 2, Procurement Methods, contains the Commonwealth policy stating the State's laws concerning discrimination and the policy of the Commonwealth to contribute to the establishment, preservation, and strengthening of small businesses and businesses owned by women and minorities, and to encourage their participation in state procurement activities. Toward that end, the Commonwealth encourages firms to provide for the participation of such businesses through partnerships, joint ventures, subcontracts, and other contractual opportunities.

The U.S. Department of Commerce, Small Business Administration, representative explained the 8a program and answered questions concerning their certification program. Discussions are progressing between the Small Business Administration and the Federal Highway Administration to develop a single certification process for the federal government. However, there are several issues to be resolved before a single certification for the federal government is achieved.

Virginia Commonwealth University reported on its supplier diversity program that was started in 1987. The University has a business strategy and policy, both of which require diversity in procurement.

The university actively solicits minority businesses in the procurement process from a list developed at the institution because an appropriate data base is not readily available to meet their procurement needs in a timely manner. They do use the lists of the Department of Minority Business Enterprise as well as the Metropolitan Business League and the Virginia Minority Supplier Development Council

They encourage subcontracting, partnerships, and joint ventures between large companies and minority-owned businesses. There is a voluntary, but closely monitored, goal of 20 percent minority participation in all formal solicitations to include capital construction projects. An annual expenditure goal is used to measure the programs success.

Principal reasons why Virginia Commonwealth University is active in promoting business opportunities with minority firms are:

- promoting strong economic growth in the minority business community
- taking a leadership role in a diverse community
- ensuring as large a pool as possible of high-quality minority firms with which to do business
- complementing the University mission to promote a diverse community of learning

The university goal is to meet or exceed annual minority expenditures, which is reflected in consistently increased expenditures with minority firms by 2,921 percent since the advent of the minority outreach program in 1987.

The **Virginia Regional Minority Development Supplier Council**, a not-for-profit organization, has a detailed certification process for their respective business clients. Corporate membership, member dues, and fees for certification support this organization.

Second Meeting:

The second meeting of the Competition Council Task Force heard testimony from the minority business community. The substance of their statements may be summarized as follows. The businesses raised the question of and about the lack of priority for diversity and equality for all contracts issued by the Commonwealth.

The number of minority and women-owned business in the State is growing rapidly and this fact does not seem to be reflected in the number of contracts awarded to these groups in comparison to the overall number of awards. The certification programs is entirely too complicated and fragmented. Why can't there be a single certification program? Some certification programs ask personal type questions that do not appear germane to the process and add undue complexity to the certification application.

The Virginia Regional Minority Supplier Development Council and the Virginia Department of Transportation certification programs do contain requirements for more personal information than does the application from the Department of Minority Business Enterprise. Unfortunately, minority contractors do not distinguish between the different certification agencies when discussing the various certification requirements.

Another minority business asked what the State was going to do to assure fair play in awarding of contracts to minority business enterprises? They wanted to know what the minority business enterprise goal was for the State and how does the State track contract awards.

Several contractors expressed dissatisfaction with the Virginia Department of Transportation minority-disadvantaged business enterprise program. Issues developed during the meeting were referred to VDOT for resolution and a subsequent meeting with VDOT representatives coordinated a process for the businesses to receive appropriate responses.

The businesses wanted information concerning the number of contract awards for minority and women-owned businesses in a timely manner. The annual report comes out six months after the end of a fiscal year and is not timely or useful. The question was raised as to why minority and women-owned businesses had to go through repetitive certification programs throughout the state. The question was asked why a minority firm had to go through certification when other contractors did not have to complete certification. If there is to be certification, then there should be one process for the state.

Another business said they separated certification from contracts. We have to be certified because all groups have equal opportunity to do business with the state and it is that way (certification) to see if it is equitable. Because you are certified does not mean a dollar in your pocket. The question is how to streamline and improve the certification process.

The Commonwealth has a vested interest to do business with all groups. You must know who is a minority, women, or whatever. That is why you must do certification. You do not have a quota but you must accurately measure the number of contracts awarded throughout the State.

Another business stated they work mainly for VDOT and the certification process is long and hard to do. The system works against disadvantaged business enterprises. When there are issues with the prime contractor, the VDOT answer is that they have the contract with the prime contractor not the subcontractor.

One business stated a need for the certification program, but there is a need to have someone to ensure the prime contractors are doing what they say. Not just claiming to use minority firms to get a contract and then not hiring a minority subcontractor. The second question is one of diversity. How do you ensure the contracts are equitably distributed in a competitive environment? You have to have a straightforward certification program to start with. Unless you have a valid certification to attest to the fact, you will never know if you are making progress.

Certification opens the doors to other resources. How do the resources get marshaled for minority businesses? There is a lot of economic growth in the minority community across the State. The question was raised concerning the attitude and lack of interest of State employees charged with the responsibility to implement the procurement policies of the Commonwealth. The change in attitude and awareness of the State's requirements need to reach to that level also. All guidance, procedures, etc., used by State agencies and institutions must conform to the Public Procurement Act, §2.2-4310 of the *Code of Virginia*, and support the identified certification program.

The **Director of the Department of Minority Business Enterprise** addressed the meeting concerning the growth of the State's minority population and related business community issues in the future. The Director stated that diversity is a natural descendant or offspring of affirmative action. Some may view diversity as diluting the pot or an effort or movement designed to dismantle affirmative action. It does neither.

Diversity is a process - not a program - that promotes tolerance and understanding of cultural and ethnic differences. It focuses on creating cohesive communities and workforces - on recognizing and valuing cultural and ethnic differences instead of merely tolerating numbers.

This process, diversity, creates cultural consideration for the right to be different. For the right to be African American, Asian, Hispanic or Native American, or disabled, female, or elderly and feel comfortable incorporating those differences into developing strategy, problem solving, and enriching the infrastructure in business and education. Each of these aspects provides slightly different dimensions to our world, making it richer and broadening the base of talent needed to stimulate market growth and economic development.

Changing demographics affect the business bottom line. Diverse population creates marketing opportunities within the individual communities and the business climate in general. Finally, recognizing that their growth is largely dependent on how well they cater to the increasing demands for quality services from minority communities, corporations have begun altering their business practices.

Moreover, growing diverse communities stabilized by the growth of their own enterprises, create jobs and wealth within their own borders and contribute to the country's economic wellness. The correlation between the growth of minority businesses and overall economic well being is undeniable. Affirming this correlation should be an integral component of every local and state government mission, and the creation of an environment conducive to the development and promotion of minority business as a priority.

Third Meeting:

A third Task Force meeting focused on best practices in supplier diversity from three major businesses in the area. These were **Philip Morris, Dominion Resources, and Bon Secours Hospital**. All three businesses have similar approaches to supplier diversity. Each company emphasized the need for a strong minority supplier diversity program as a component of corporate business policy.

Although the three firms' diversity programs differ slightly in their respective implementation, each contained similar strategies and goals. These key elements form a best practices framework, which is discussed below.

Best Practices in Supplier Diversity:

The term "supplier diversity" is defined as a proactive process that seeks to achieve equal access to purchasing opportunities for all qualified minority and women-owned firms. Supplier diversity is good for business and must be supported from the top as evidenced by their respective CEO publications and oversight by high level boards which review corporate progress every six months.

Senior management of each operating company is responsible for the results of unit programs and devotes substantial resources to directing them. Employee awareness is high, and the managers who are responsible for purchasing goods and services are held accountable for increasing both the number of minority-owned and women-owned vendors and the volume of business with them.

At the operating company level, a cross-functional team of specialists supports the program and has the goal to buy competitively priced and high quality goods and services from minority and women-owned businesses. Each team is guided by the following principles:

- Clearly stated procurement standards and expectations to the diverse vendors
- Apply corporate knowledge and resources toward growing and developing leading minority and women-owned suppliers
- Provide honest, constructive feedback to diverse suppliers and purchasing managers
- Identify mutually beneficial business synergies with diverse suppliers
- Maintain accountability for the results of the program with senior management.

The importance of developing and maintaining close ties with people of color and women should be self evident to all business people. According to the Selig Center for Economic Growth at the University of Georgia, the total US consumer purchasing power in 1998 was \$6.1 trillion, of which:

	<u>Accounted for</u>
African-Americans	\$ 502 billion
Hispanics	\$ 354 billion
Asian Americans	\$ 210 billion
Native Americans	<u>\$ 30 billion</u>
	\$1,096 billion

Their combined share was \$1.1 trillion and is expected to climb rapidly.

Furthermore, the number of businesses owned by people of color has also been increasing and now accounts for 3.25 million businesses, a jump of 168 percent during the last decade. They employ 4 million, generating \$5 billion in revenue.

While women of all ethnic backgrounds have long wielded enormous purchasing power, in the past 10 years the rise of women-owned businesses has been explosive and constitutes one of the fastest growing segments of the entire U.S. economy. The U.S. Small Business Administration, Office of Advocacy, estimates that there were 8.5 million women-owned businesses in 1997, accounting for more than one-third of all businesses and generating \$3.1 trillion in revenues.

The firms shared a conviction that successful companies have a strong obligation to help improve the lives of people in the communities in which they operate. By strengthening the morale, cohesion, and economic prosperity of all these communities, supplier diversity programs help create more businesses, more entrepreneurship, more employment, and more business training. It was also noted that a strong minority business community leads to less reliance on the social welfare programs of government.

2nd Tier Opportunities:

An extensive discussion was presented concerning 2nd tier opportunities. A majority business cannot do business with every minority business enterprise or may not be able to use many small minority businesses. Also, although you should search them out, there may not be a minority business that can supply one or more of your specific needs. It may not be economically feasible to use a minority firm. For these and other various reasons, 2nd tier contracts may be the answer. 1st tier suppliers (prime contractors) subcontract with 2nd tier firms (minority and woman-owned). The 2nd tier expenditures count just as 1st tier expenditures do toward your supplier diversity objectives. The key is to require your 1st tier suppliers to

use 2nd tier firms and to report their dollar expenditures for these 2nd tier firms. This causes proliferation of minority business opportunities and facilitates raising the program goals. An opinion was expressed that the 2nd tier expenditures should be directly related to your business, which means that they are traceable.

There are several ways to improve your chances of using a minority firm. These include 2nd tier efforts, strategic alliances, and joint ventures. The key is to get your purchasing department to make sure strategic alliances hit the ground running.

The businesses reported that they do not use set aside contracts or percentage allowances. Every supplier is given an equal opportunity. The companies evaluate minority involvement in each major bid and require that minority firms meet certification requirements.

These certification requirements include a supplier business profile to add a minority or women-owned business to their databases. The companies require on-site certification with minority businesses with which they spend over \$10,000 per year.

Supplier diversity is a proactive process that seeks to achieve equal access to purchasing opportunities for all qualified minority and women-owned firms. Businesses use supplier diversity development champions. These are important representatives from each department who are the “eyes and ears” for minority and women business opportunities. Champions play a key role in the companies' record-breaking growth in the number of minority and women-owned business contracts and dollars expended. Key functions of the supplier diversity development champions are in the determination of departmental goals, communicating progress toward those goals to department personnel and to help identify new opportunities.

Agency Responses

As part of an extensive validation process, the major State agencies involved in the Commonwealth Competition Council's assessment of the minority certification program were given an opportunity to comment on the draft of the report. Appropriate technical corrections resulting from their written comments have been made to this version of the report. These include comments from the Service Division of the Department of Minority Business Enterprise.

Time Line: December 19, 2001

Draft copies of report sent to the Director, Department of Minority Business Enterprise and its Certification Service Division. Copies were also sent to the Virginia Department of Transportation, Department of General Services, Virginia Commonwealth University and City of Richmond Office of Minority Business Enterprise.

December 28, 2001

Comments were received from the Service Division of the Department of Minority Business Enterprise which were included in the report as appropriate. The Service Division comments are included in the Appendix.

January 2, 2002

Commonwealth Competition Council approved the report as revised and authorized its release to the Governor, General Assembly, and Small Business Commission.

January 9, 1992

Director of the Department of Minority Business Enterprise wrote to the Chairman of the Commonwealth Competition Council, taking issue over the release of the report. The letter has been included in its entirety because, among other things, it addresses issues and propounds opinions that are beyond the scope of the minority certification study.

Email:

Subject: Draft CCC Report
Date: Fri, 28 Dec 2001 18:37:55 -0500
From: Miles Willie <wmiles@dmbe.state.va.us>
To: "Phil Bomersheim" <pbomersheim@ccc.state.va.us>
CC: Singleton Oliver <OSingleton@dmbe.state.va.us>,
McCullough Allegra F
<amccullough@dmbe.state.va.us>

Comments and Suggestions

Note. Comments are added information for you or just feedback. Suggestions or Suggested wording is recommended for incorporation.

Page 7

Suggestion:
change "Virginia Expenditures with Minority Owned Businesses" to
Table 1
Virginia Expenditures with Minority3 Owned Businesses

Page 8

Third paragraph, third and fourth sentences.

Suggested wording:

The lack of a readily available web based certification program by the Department of Minority Business Enterprise may have contributed to the extensive duplication of effort by numerous state agencies and institutions in their effort to comply with existing law. Furthermore, it may have contributed to the unintended of consequence of creating confusion and misinformation in the minority business community.

Page 9

Second paragraph first and fourth sentences.

Suggested wording:

The Department of Minority Business Enterprise must demonstrate leadership and significant improvement in the core mission function of certification in the coming calendar year of 2002. The department's apparent failure to

.....

Third paragraph last sentence.

Suggested wording:

Leveraging the existing multiple sources of training, certification persons, and acting as a referral center further expands the Department of Minority Business Enterprise ability to serve the minority community needs without additional funding to the State's Diversity Program.

Fifth paragraph first sentence.

Suggested wording:

The State can not do business directly with every minority firm..

Page 14

Fourth and Third paragraph from the bottom.

Comments:

VDOT's numerical target was not lowered from 12 to 10 percent because of Adarand. VDOT submitted to the USDOT a Goal Setting Methodology which takes in several factors to arrive at the percentage.

Aspirating goals are targets that agencies can use to gage their performance and as such make appropriate changes in a timely manner. VDOT's State projects were getting approximately 6 percent minority participation several years ago, with no enforcement criteria in the program. Since, the removal of any reference to a State DBE Program, VDOT's State projects are now getting approximately 2 percent minority participation.

Page 15

Second paragraph from the bottom.

Comments:

You may wish to add wording to suggest that at the time DGS goes out to perform their oversight function of procurement practices and policies that VDMBE team with them to provide assistance to the agencies with their MBE Procurement Plan.

Page 17

Second paragraph from the top new last sentence. Suggestion:

This requirement goes unfulfilled by some State agencies each year.

Page 22

Fourth paragraph from the top last sentence.

Suggestion:

Change to read.to support VDOT Disadvantage Business Enterprise (DBE) and Women-owned Business Enterprise (WBE) program.

Seventh paragraph from the top

Comment:

The 1982 Surface Transportation Assistance Act (STAA) which was signed into law on January 6, 1983. Section 105(f) of this Act contained three significant elements: 1) It gave DOT's MBE program a statutory authority; 2) Established a 10% goal for program participation for MBE only; 3) Based eligibility on social and economic disadvantage rather than just ethnic and cultural disadvantage -- Hence the historic name change from "minority" to the "disadvantaged" business enterprise (DBE) program.

The Surface Transportation Uniform Relocation Assistance Act (STURAA) was passed on April 2, 1987. Section 106(c) of STURAA replaced section 105(f) of STAA as statutory authority for the DBE program. STURAA had 5 major provisions. 1) Continued the 10% DBE participation goal; 2) Made women part of the presumptive disadvantage group; 3) Set size standard limitation for DBEs at \$14 million over 3 years; 4) Required uniform certification criteria and on-site reviews; 5) Required recipients to update their directories of eligible DBE firms annually, including location.

Page 24

Second paragraph

Suggestion:

Change to read...

The relatively low percentage of expenditures based on the certified list is distressing. It points to several issues in the current procurement program, procurement lists, certification program, and the duplication of the certification list. This will be discussed in the context of information developed in the hearings conducted by the Commonwealth Competition Council Study Team.

Fourth paragraph last sentence.

Change to read.the Virginia Department of Transportation.

Sixth paragraph

Suggestion:

Add the following: The *Code of Virginia* does not address this certification program. State agencies may have procured services or goods from the firms in this program believing the firm is a State certified WBE. The WBE firms believe that they are receiving a State Certification addressed by the Code of Virginia. Those procurements may not be reflected as expenditures with DBEs in the Annual Report unless the WBE has also been certified by VDMBE.

Page 25

Second paragraph

Suggestion:

Add the following sentence at the end of the paragraph.

The Virginia Department of Minority Business Enterprise has more certified DBE firms in its data base than the other mentioned organizations.

Page 27

Second paragraph

Comment:

If you saw any documented evidence of the policy in action among the agencies we like to review it and meet with those agencies. If it was evident that was observed by the Study Team, then we would also appreciate hearing more about what was observed.

Fifth paragraph

Comment/Suggestion:

The University is truly working to be inclusive of DBE firms in their procurement program and has succeeded in having one of the best programs among State agencies. As noted before the *Code of Virginia* does not address the certification program or registry list of the Metropolitan Business League or Virginia Minority Supplier Development Council. State agencies may have procured services or goods from the firms certified or registered with these organizations believing the firms were State certified DBE. The DBE firms receiving this type of Certification and the procurement benefits offered by the University have little incentive to get State Certification which is addressed by the *Code of Virginia*. Plus, procurements from those non State certified firms contribute to the relatively low percentage of State expenditures with DBEs in the Annual Report.

Page 28

Fifth paragraph from the top of page.

Suggestion: Add the following.

This was the clearest cry by the DBE firms for one stop State Certification. The *Code of Virginia* establishes these criteria. Certification by non-State organizations may and should continue for DBE firms who wish to belong to those organizations.

Seventh paragraph from the top of page.

Suggestion: change the first sentence to read..

.....Transportation minority-DBE program.

Page 29

Fifth paragraph

Suggestion: Add the following.

All guidance, procedures, manual, and etc. used by State agencies should conform to the Procurement Act and support the certification program as identified in the Act.

Page 33

Third paragraph

Suggestion: Add.

However, the data base contents largest number of certified firms of any other agency or organization which performs certification.

Comments:

The comparison that is made in this paragraph is absent of the driving force that motive DBE firms to seek State certification in the first place. CONTRACTS. Point being the data base has over 4,000 names of DBE firms, which means that approximately 3,000 firms left the program. Highlighting the need for enforcement/oversight of certification through procurement process to ensure that the State establishes and maintains a strong Diversity program.

Page 34

Second, Third, and Fourth paragraphs

Comments:

Many agencies maintain their on list primary due to the Agency Procurement and Surplus Property Manual directs to maintain a list. This weakens the certification program, tasking agencies to accept firms as DBEs with using any criteria, and thus, raising a cloud over the State DBE procurement.

The VDMBE has reached out to every State agency with an offer to assist them in getting firms, (firms claiming to be DBEs), from which the agency procures goods and services, State certification as DBE. As it stands now the there are several, well meaning, actions taking place that are contributing to frustration in the DBE community and weakening the Certification program and the intent of the Procurement Act relating to certification.

Page 40

Comments:

For reasons stated in the third and fourth paragraphs, VDMBE should be part of the Procurement Review that is identified in the first and second paragraphs.

Recommendation (4)

Suggestion: Add...

.....procurement review process and include the VDMBE of activities related to minority business.

Recommendation (6)

Suggestion: Add...

The Department of Business Assistance should resolve all function that apparently conflicts with *Code of Virginia* and functions of the VDMBE.

Recommendation (7)

Suggestion: Change to read..

All State agencies, institutions, and authorities should be directed to assist VDMBE with properly including DBE firms from their lists into the State internet assessable Certified DBE data base. VDMBE should be provided resources to complete this essential task during the calendar year 2002.

Page 42

Second paragraph

Suggestion: Add

The VDMBE data base of State certified firms is the largest such data base available to State agencies.

Thanks for the opportunity to provide this input.



COMMONWEALTH of VIRGINIA

James S. Gilmore, III
Governor

Barry E. DuVal
Secretary of Commerce and Trade

Department Of Minority Business Enterprise
200-202 N. Ninth Street, 11th Floor
Richmond, Virginia 23219

Allegra F. McCullough
Director

Frank M. Ramos
Chief Deputy Director

January 9, 2002

The Honorable Emmett Hanger
Chairman, Commonwealth Competition Council

Dear Senator Hanger:

On January 2, 2002, The Commonwealth Competition Council released *A Study of Virginia's Minority Certification Program*. The draft study, submitted initially on December 19, 2001 via e-mail to many who participated in the study was not presented to me until January 5, 2002- and only after a member of the press called to receive a statement from me. I was on vacation from December 19, 2001 through January 4, 2002 and my "out of office email reply indicated this. I had no knowledge of the draft or that a final version had been released for public scrutiny prior to my examination or response. Furthermore, in my experience, studies directed to the General Assembly or any executive branch of government are never released to the public prior to those bodies receiving the information.

This study, while containing evidence of a desire to correct state procurement ills, also contains many incorrect facts. In consideration of time, I will attempt to be brief in my analysis of the document.

The study does not make delineation between historical practices of VDMBE and current studies, new direction, etc., since August 2000. Failure to do this clearly gives the impression that:

- the Agency is clueless as to its needs
- the Agency currently has deficits in numerous areas such as state resource information, training delivery, and business opportunity forums
- the Agency has not assessed its certification program or attempted to submit legislative proposals that would strengthen its mission
- the Agency refused to release its 2001 procurement report to the Council

In addition, the Council failed to consider or note the following:

- the Agency has expressed frustration over the lack of administrative support of the Agency's role of assisting agencies with a supplier diversity plan or its authority to adequately monitor and report agencies that refuse to report minority procurement data in a timely manner

- The Agency has struggled to develop an interactive certification web-site even though neither the 2000-2001 nor 2002-2004 budgets provide adequate developmental support. In order to support the state's mandate we have had to barter with technology entities to provide basic or pro bono services.
- Prior to April of 2001, because of the Agency's history of ineffectiveness and the previous director's behavior, other few state agencies often refused to return phone calls/correspondence from the staff; that before the Director invited various agencies to become members of the Interdepartmental Board, she provided proof of financial controls and recent achievements; that since its formation, the director has met, sought counsel from numerous members directly
- The full implementation of an Interdepartmental Board without an executive supported infrastructure would represent change management from the middle and therefore an incorrect model for encouraging/directing change; The full implementation of an Interdepartmental Board without a strategic plan would have wasted valuable time
- Protocol prohibits an executive directed report to be released to any entity until a reasonable time has been given for the executive review of the information
- The Agency has 3 state strategic partners, 1 federal and 13 diverse statewide partners

There are also inaccurate statements regarding:

- Virginia Commonwealth's non-use of our vendor lists. (The procurement officer requested and was granted permission by the Agency director in January 2001 to use VDMBE's list on the VCU procurement web site
- The largest minority vendor list used by Radford University's Economic Pipeline or any entity in Virginia is the VDMBE's vendor list

Overall, the study fails to make it clear that although the Code of Virginia and Administrative Codes address fair treatment of minorities in state procurement, the language used is banal and draw incorrect conclusions.

While a drastic change in the State's procurement laws, philosophy and implementation of a positive supplier diversity attitude is needed, the Council's process of reaching its conclusion, non-notification of VDMBE's Director of the final study, and possibly the Attorney General's Office were inappropriate. This study as it stands could seriously damage the Agency, the outgoing Administration and create a huge obstacle to the incoming Administration. Therefore, I ask that you freeze the further dissemination of this study.

Cc: Phil Bomersheim, Executive Director, Commonwealth Competition Council

The current executive staff met all mandates set by Governor Gilmore prior to July 1, 2001 – financial, policy and procedure controls, development and implementation of a successful loan program, develop and implement state wide training, workshops, etc.